(4)

No. 00-73

IN THE

Supreme Court of the United States

October Term, 1999

JOSEPH M. ANDERSON,

Petitioner,

vs.

NIAGARA MOHAWK POWER CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE FOURTH JUDICIAL DEPARTMENT.

REPLY TO BRIEF IN OPPOSITION and TO THE BRIEF OF *AMICUS CURIAE*

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PRELIMINARY STATEMENT

Pursuant to Rule 15.6 of the Rules of the United States Supreme Court, petitioner Joseph M. Anderson submits this reply brief addressed to new points raised in the Respondent's Brief in Opposition and the Amicus Curiae Brief of the Tuscarora Nation of Indians.

AN INDIAN NATION'S SOVEREIGNTY CANNOT BE USED BY NON-INDIAN LITIGANTS TO AVOID STATE COURT JURISDICTION UNDER 25 U.S.C. §233.

Essentially, the respondent and the Tuscarora Nation argue that the Tribe's sovereign immunity trumps Congress' grant of civil jurisdiction to New York Courts (25 U.S.C. §233).

If an Indian Tribe's immunity from suit in state court required *per se* joinder of a tribe in every suit for damages involving a member of an Indian nation, no Indian or other person would ever be able to enforce a contract or sue to seek payment for services or goods delivered on an Indian reservation. Respondent's overly broad application of the doctrine of sovereign immunity, as adopted by New York's Appellate Division, Fourth Department, violates Congress' express intent to provide access to state courts to resolve disputes arising on Indian reservations.

Because the sovereignty of Indian tribes is subject to Congressional control, the scope of tribal sovereign immunity is necessarily a matter of federal law. *See,e.g., Kiowa Tribe v. Manufacturing Technologies*, 523 U.S.751, 759 (1998) (directly addressing questions of tribal sovereign immunity) and *Santa Clara Pueblo v. Martinez*, 436 U.S.49, 55 (1978).

Despite the Court's concerns that its early precedents assumed immunity without extensive reasoning, and doubts concerning the wisdom of extending tribal immunity beyond the bounds of Indian lands, the Court held in *Kiowa* that Congress was the proper body to consider any abrogation of tribal immunity. In *Kiowa*, the court reiterated two fundamental principles regarding tribal sovereign immunity. First, like foreign sovereign immunity, tribal immunity is a matter of federal law. 523 U.S. at 759. Second, Congress, subject to constitutional limitations, can alter the limits of tribal sovereign immunity through explicit legislation, although the Supreme Court has traditionally taken the lead in drawing the bounds of tribal immunity. *Id.; see, also*, 523 U.S. at 760-766, (Stevens, J., dissenting).

Kiowa was an action for damages, not a suit for declaratory or injunctive relief. In *Puyallup Tribe v. Department of Game of the State of Washington*, 433 U.S. 165, 171 (1977), the Court reaffirmed that "whether or not the Tribe itself may be sued in a state court without its consent or that of Congress, a suit to enjoin violations of state law by individual tribal members is permissible." The Court cited *Puyallup* the next Term in finding a tribal governor not immune from a suit seeking declaratory and injunctive relief against enforcement of a tribal ordinance. *See, Santa Clara Pueblo v. Martinez*, 436 U.S. at 59. Justice Stevens has suggested that tribal sovereign immunity might not extend "to claims for prospective equitable relief against a Tribe." *Oklahoma Tax Commission v. Potawatomi Indian Tribe*, 498 U.S. 505, 515, (1991) (Stevens, J., concurring); *see, also, Ex Parte Young*, 209 U.S. 123 (1908).

There is no question, pursuant to *Kiowa*, that the Tuscarora Nation is immune from suits for damages. However, there is no authority from this Court to support the argument that the

doctrine of tribal sovereign immunity can be extended to require dismissal of private actions between tribal members and non-Indian litigants, if the Tribe does not consent, no matter how incidental the Tribe's interest.

Respondent cites *Fluent v. Salamanca Lease Authority*, 928 F.2d 542 (2d Cir. 1991), *cert. denied*, 502 U.S.818 (1991), where non-Indian lessees sought reformation of the Seneca Nation of Indians' agreement with an intermediary agency in a dispute directly involving the Nation's leases of land in the City of Salamanca, New York. In *Fluent*, Congress enacted legislation to renew the Seneca leases and landowners who objected sued the leasing authority established under such legislation to invalidate or reform the new leases. Since the Seneca Nation was a party to the leases, its interest was obvious. The Tuscarora Nation cites the district court's opinion in *Niagara Mohawk v. Tonawanda Band of Seneca Indians,* 862 F. Supp. 995 (W.D.N.Y. 1994) in support of its necessary party argument, but omits reference to the Court of Appeals' opinion, *Niagara Mohawk v. Tonawanda Band of Seneca Indians,* 94 F. 3d 747, 754 (2d Cir. 1996), dismissing Niagara Mohawk's declaratory judgment action because there was no actual controversy between the parties over the validity of the franchise agreement, without reaching the issues of sovereign immunity and whether the tribe was an indispensable party.

Petitioner Anderson has not brought any claim against the Tuscarora Nation, or sought to reform any Nation agreement or authorize any new entry onto Nation lands. Anderson only seeks damages from a New York utility company for breach of a distinct contract with him. Niagara Mohawk continues to provide service to other customers at Tuscarora and has hooked up other new customers at Tuscarora (R. 258-59, 283, 286, 310,

349, 362-388), notwithstanding Niagara Mohawk's unsuccessful litigation to reform its franchise agreement.

The gist of Anderson's complaint is that Niagara Mohawk contracted to provide him with expanded service, despite conflicting communications with Tuscarora Chiefs, consistent with Niagara Mohawk's duty to provide nondiscriminatory service to all customers at Tuscarora.[1] Anderson argues that Niagara Mohawk breached its agreement by adopting a "no new service" policy, less than two weeks later, thereby nullifying any tribal consent dispute. By entering into a separate service contract with Anderson, despite any perceived problems, Niagara Mohawk assumed the risk of nonperformance, much like a speculator who contracts to sell property in the future which he does not own today. A jury can determine whether any factual issues involving the alleged tribal consent requirement constitute a sufficient excuse for Niagara Mohawk's nonperformance.

The Tuscarora Nation's sovereign immunity is not a readily transferrable shield for use by non-Indian corporations to deflect legal challenges by Indian citizens. By attempting to expand tribal sovereign immunity through a procedural device which rarely results in dismissal in non-Indian contexts, the respondent and the Tuscarora Nation highlight the important federal question raised herein, *i.e.*, whether an Indian Nation's

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1 In response to Anderson's record reference to Tuscarora Chief Webster Cusick's sworn disavowal of any tribal consent provision (R. 434-463) and respondent's admission of similar communications with Chief Cusick and Tuscarora Chief Arnold Hewitt (R. 167-168, 283, 314), Niagara Mohawk cannot cite any contrary sworn testimony or other admissible evidence from the record, but merely refers to an unattributed newspaper notice, off-reservation newspaper articles, and a law review writer's opinion of Anderson (See Brief in Opposition, 15-16).

sovereign immunity can be used to deny justice to persons or corporations transacting business on Indian reservations.

Unlike the 1968 amendments to Public Law 280 (See 25 U.S.C. §1322), which gave certain western tribes veto power over Congress' consent to state civil court jurisdiction [see S. REP. NO. 721, 90th Cong. (1968), reprinted in 1968 U.S.C.C.A.N. 1837, 1865-566], Congress' grant of civil jurisdiction to New York courts in 25 U.S.C. §233 was not conditioned on the consent of the Iroquois Nations. Just as the Court granted certiorari in *Williams v. Lee*, 358 U.S. 217, 218 (1959) to reverse a state court's doubtful exercise of civil jurisdiction over a private reservation contract dispute in the absence of an express federal grant, the Court should grant certiorari to consider the Appellate Division's summary denial of a Native American's access to judicial process where Congress has granted such jurisdiction, pursuant to 25 U.S.C. §233.

Dated: August 23, 2000

Respectfully submitted,

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